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No. 90-617

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1990

JAMES DOMBROSKI,
*Petitioner,*

v.

F2 AMERICA, INC., and F2 INTERNATIONAL, INC.,
*Respondents.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## REPLY MEMORANDUM FOR PETITIONER

MARK HERRMANN
Counsel of Record
JONES, DAY, REAVIS & POGUE
North Point
901 Lakeside Avenue
Cleveland, Ohio 44114
(216) 586-3939
*Attorneys for Petitioner*
*James M. Dombroski*

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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## REPLY MEMORANDUM FOR PETITIONER

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Respondents have failed to show that this case does not warrant review by this Court.

1. Respondents concede that this case presents a question of federal law that has not been resolved by this Court. *See* Br. in Opp. at 4.

2. Respondents urge, however, that the lower courts' use of disparate standards to review magistrates' orders imposing sanctions does not reflect a true conflict in the cases. Respondents argue that courts have employed *de novo* review not out of necessity, but rather because they

affirmatively wanted to employ a gratuitously high standard of review. (Br. in Opp. at 11-13.) In respondents' world, *de novo* review in these cases was not grounded in legal necessity, but in an abundance of caution.

a. There is, of course, no support in the cases for that hypothesis. In the cases cited in the petition, none of the trial courts held—either explicitly or implicitly—that they were simply choosing to review *de novo* out of abundance of caution.

To the contrary, and in sharp contrast to the case below, in *Lancellotti*, *John*, and *Smith*, the trial courts reviewed orders imposing sanctions *de novo*, and the First, Fifth and Sixth Circuits noted that choice with apparent approval. Those trial courts plainly did not think that review for clear error was a permissible choice. And if the appellate courts had thought *de novo* review was a gratuitously high standard, they would not have spoken of the trial courts' decisions with approval.

b. Moreover, at least in the Third Circuit, it would have been error for the trial courts to review *de novo* out of an abundance of caution. Under *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108 (3d Cir. 1986), *cert. denied*, 484 U.S. 976 (1987), a trial court errs if it reviews a magistrate's order *de novo* when the law mandates review only for clear error. *Id.* at 1120.

The many cases cited in the petition (at 13-14) are thus not gratuitously employing a high standard of review. They are instead carefully reaching a result contrary to the decision below.

c. Respondents next urge that "[e]ven if there is a conflict or confusion in the lower courts, the present case is . . . factually and legally distinguishable." (Br. in Opp. at 13.) Respondents point to certain facts underlying this case, none of which is relevant to the legal question presented on certiorari. Respondents urge, for example, that here, unlike in certain other cases, the sanctions were not

imposed in conjunction with a dispositive motion (Br. in Opp. at 14), and here, unlike in certain other cases, the sanctions totalled only $1,000. (*Id.*) But neither Article III nor the Magistrates Act draws distinctions such as these. Whether a case "is factually or procedurally . . . complex" (*id.* at 15) cannot be relevant to the legal question whether a magistrate possesses the constitutional and statutory authority to award sanctions.

3. Respondents also insist that the court below reached the correct result. They rely primarily on the Latin maxim *expressio unius est exclusio alterius*: Section 636(b)(1)(A) expressly lists eight dispositive motions that cannot be referred to a magistrate subject only to clear error review. Because Rule 11 motions are not included in that list, they are, by implication, excluded. (Br. in Opp. at 7.)

a. As a matter of law, however, "[t]he listing of dispositive matters in § 636(b)(1) is, in practice, not treated as the exhaustive description of all matters where the magistrate must proceed by a recommended decision rather than entering a final determination." 7 J. Moore, J. Lucas & K. Sinclair, Jr., *Moore's Federal Practice* ¶ 72.04[2.-6] at 72-53 (2d ed. 1990). Rather, "the courts have inquired into the nature of the matter referred to a magistrate, rather than merely scanning the list of motions found in subsection (b)(1)(A)." 12 C. Wright, A. Miller & F. Elliott, *Federal Practice & Procedure* § 3076.5 at Supp. 45 (1990).

b. In *Gomez v. United States*, 109 S. Ct. 2237 (1989), this Court analyzed whether the "additional duties" clause of the Magistrates Act (§ 636(c)) empowers a magistrate to preside at the selection of a jury in a felony trial. Jury selection is not one of the eight dispositive motions identified in Section 636(b)(1). En route to its decision, the Court "concluded . . . that jury selection is more like the dispositive matters governed by § 636(b)(1)(B)" and rejected the contention "that jury selection

is among the pretrial matters that a magistrate may 'hear and determine,' subject to review only for mistakes that are clearly erroneous or contrary to law." *Id.* at 2247 n.28. Thus, under the Magistrates Act, the inclusion of some dispositive matters in Section 636(b)(1) does not by implication exclude others.

c. Respondents' other urgings as to why the court below reached the correct result are no more meritorious. Respondents urge, for example, that petitioner would "deny magistrates the power to prohibit abusive tactics in pretrial matters." (Br. in Opp. at 8.) But he would not. Petitioner would only ensure that orders imposing Rule 11 sanctions, which are inherently judicial in nature, are reviewed independently by an Article III judge.

Similarly, petitioner never suggested that "a Rule 11 motion is the same thing as a contempt proceeding." (Br. in Opp. at 8.) He suggested only that similar Article III concerns apply in both contexts—a point that respondents concede by silence—and that Article III judges should oversee both modes of punishment.

4. Finally, the legal question presented here is of continuing importance and warrants review. With over 1,000 published opinions analyzing Rule 11 in just the first seven years of its existence, magistrates will surely seek to exercise Rule 11 power in the future. Indeed, in the two months since we filed the petition for certiorari in this case, yet another trial court has reviewed a magistrate's Rule 11 order *de novo*, *Deerfield Specialty Papers, Inc. v. Black Clawson Co., Inc.*, 1990 U.S. Dist. LEXIS 13545 (S.D.N.Y. Oct. 12, 1990), and yet another for clear error. *Bergeson v. Dilworth*, 1990 U.S. Dist. LEXIS 14661 (D. Kan. Oct. 23, 1990). *See also Heinrichs v. Marshall & Stevens, Inc.*, —— F.2d ——, 1990 U.S. App. LEXIS 21399 (2d Cir. Dec. 7, 1990) ("district court conducted a de novo review" of magistrate's order imposing $4048.38 in discovery sanctions).

Rule 11 is a potent tool that carries with it the power to "chill vigorous advocacy" in the federal courts. *Cooter & Gell v. Hartmarx Corp.*, 110 S. Ct. 2447, 2454 (1990). Article III of the Constitution, the legislative history of the Federal Magistrates Act, and the treatment of orders imposing sanctions in the majority of the courts of appeals all demonstrate that the law was never intended to give federal magistrates the power freely to impose Rule 11 sanctions.

For these reasons and those given in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

MARK HERRMANN
Counsel of Record
JONES, DAY, REAVIS & POGUE
North Point
901 Lakeside Avenue
Cleveland, Ohio 44114
(216) 586-3939
*Attorneys for Petitioner*
*James M. Dombroski*

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